STATE OF MICHIGAN

IN THE SUPREME COURT

RICHARD COSTA and CINDY COSTA,

Plaintiffs-Appellants,

-vs-

COMMUNITY EMERGENCY MEDICAL SERVICES, INC., a Michigan corporation, DAVE HENSHAW, SCOTT MEISTER, DONALD FARENGER and LISA M. SCHULTZ,

Defendants-Appellees.

_____/

Supreme Court No. _____

Court of Appeals
Nos. 247983, 248104 ap 9/21/04

Lower Court No. 02-202463-NH

Wayne J. Gillis

NOTICE OF HEARING

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

FILED

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STATE OF MICHIGAN

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RICHARD COSTA and CINDY COSTA,

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COMMUNITY EMERGENCY MEDICAL SERVICES, INC., a Michigan corporation, DAVE HENSHAW, SCOTT MEISTER,

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and

DONALD FARENGER, LISA M. SCHULTZ, JANE and/or JOHN DOE

Defendants.
_____/

Supreme Court No. _____

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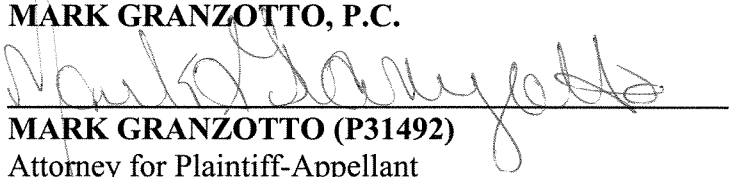
Lower Court No. 02-202463-NH

NOTICE OF HEARING

To: Clerk of the Court
Counsel of Record

PLEASE TAKE NOTICE that Plaintiff-Appellant's Application for Leave to Appeal will be brought on for hearing on Tuesday, December 14, 2004.

MARK GRANZOTTO, P.C.



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Dated: November 2, 2004

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ORDER BEING APPEALED FROM AND RELIEF REQUESTED

Plaintiffs-Appellants, Richard Costa and Cindy Costa, seek leave to appeal from the Michigan Court of Appeals decision dated September 21, 2004. A copy of that Opinion is attached hereto as Exhibit A. That opinion reversed a circuit court decision denying the defendants' request for summary disposition. The Court of Appeals' September 21, 2004 decision also affirmed the circuit court's ruling denying a request for summary disposition or default made by plaintiffs.

Plaintiffs request that this Court grant leave to appeal to consider several important legal questions presented in this case. Alternatively, plaintiffs request that the Court summarily reverse the Court of Appeals' September 21, 2004 decision and remand this matter to the Wayne County Circuit Court for further proceedings.

STATEMENT REGARDING QUESTIONS PRESENTED

I. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF WHETHER THE COURT OF APPEALS FUNDAMENTALLY ERRED IN ARRIVING AT THE CONCLUSION THAT THE DEFENDANTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF WHETHER THEIR MISCONDUCT IN THIS CASE AMOUNTED TO GROSS NEGLIGENCE?

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

II. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER WHETHER THE TWO GOVERNMENTAL EMPLOYEES NAMED AS DEFENDANTS HEREIN, MR. FARENGER AND MS. SCHULTZ, ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BASED ON THE CAUSATION ELEMENT OF MCL 691.1407(2)(c), WHERE THE COURT OF APPEALS DISPOSITION OF THIS ISSUE IS DIRECTLY AT ODDS WITH THIS COURT'S PRIOR DETERMINATION IN *ROBINSON V CITY OF DETROIT*, 462 MICH 439; 613 NW2D 307 (2000)?

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

III. SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER THE QUESTION OF THE APPROPRIATE REMEDY TO BE IMPOSED BY A COURT WHERE A DEFENDANT FAILS TO COMPLY WITH MCL 600.2912e, THE STATUTE WHICH MANDATES THAT A DEFENDANT IN A MEDICAL MALPRACTICE ACTION FILE AN AFFIDAVIT OF MERITORIOUS DEFENSE?

Plaintiffs-Appellants say "Yes".

Defendants-Appellees say "No".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On August 2, 1999, Richard Costa flew into Detroit for a business trip. Mr. Costa was accompanied on this trip by a co-worker, Joe Baker. The flight which Mr. Costa and Mr. Baker were on arrived in Detroit late in the evening. The two rented a vehicle and they checked into the Ramada Inn located near Detroit Metro Airport at 12:05 a.m. on August 3, 1999. Approximately one hour after they checked into their hotel, the events giving rise to this case unfolded.

At 1:18 a.m., an unknown woman called the City of Taylor Police Department to report that a man was lying unconscious in the parking lot of the Ramada Inn. (Deposition of Lisa Schultz, p. 54). This female caller also reported that another man was standing over the unconscious man, attempting to wake him up, but was unable to do so. (*Id*).

Two Taylor Fire Department employees, Donald Farenger, a licensed paramedic, and Lisa Schultz, a licensed emergency medical technician, were dispatched to the Ramada Inn in response to this call. Mr. Farenger and Ms. Schultz arrived at the Ramada Inn at 1:22 a.m. There, the two encountered the woman who had made the 911 call. The woman reported that a man had been lying unconscious behind a car in the Ramada Inn parking lot and another man had been standing over him, yelling to him. (Schultz Dep., p. 56). The woman also pointed out to Mr. Farenger and Ms. Schultz where this incident had taken place.

Mr. Farenger and Ms. Schultz proceeded to the area that the woman identified and found Richard Costa lying unconscious in the passenger seat of the vehicle which he and Mr. Baker had rented. Initially, Mr. Baker related to Mr. Farenger and Ms. Schultz that Mr. Costa had been drinking and passed out. However, following some further discussion, Mr. Baker acknowledged that he had struck Mr. Costa with his fist, knocking him out. (Schultz Dep., pp. 78-80).

Based on what Mr. Baker told them, Mr. Farenger was aware of the fact that Mr. Costa was not sleeping. (Deposition of David Farenger, p. 48). Moreover, while attempting to wake Mr. Costa from his unconscious state, Mr. Farenger did not smell alcohol. (*Id.*, p. 35). Thus, Mr. Farenger came to the conclusion that Mr. Costa's unconscious state was not the result of having had too much to drink. (*Id.*, pp. 49, 108).

At first, Mr. Farenger tried to bring Mr. Costa back to consciousness by talking to him and yelling at him. (*Id.*, p. 47). Mr. Costa did not respond to this stimulus. Mr. Farenger also tried a sternal rub and painful stimulation to wake up Mr. Costa. (*Id.*, p. 47). These efforts did not work either.

Within minutes after Mr. Farenger and Ms. Schultz arrived at the scene, they were joined by a City of Taylor police officer, Christopher Mize. When Officer Mize arrived, Mr. Costa was still unconscious. (Deposition of Christopher Mize, p. 36). Officer Mize observed a small amount of dried blood near Mr. Costa's nose and several spots of blood in the backseat of the vehicle. (Mize Dep., p. 52).

At 1:27 a.m., five minutes after Mr. Farenger and Ms. Schultz had arrived at the Ramada Inn parking lot, a Community Emergency Medical Services (CEMS) ambulance also arrived at the scene. That vehicle carried paramedic David Henshaw and specialist Scott Meister. At the time the CEMS ambulance arrived, Mr. Costa was still unconscious. (Mize Dep., p. 74; Schultz Dep., pp. 68-69). One or both of the CEMS employees tried unsuccessfully to wake Mr. Costa. (Schultz Dep., pp. 69-70). Mr. Farenger asked the CEMS employees for an ammonia stick which they had in their vehicle. (Farenger Dep., p. 85). The ammonia stick brought Mr. Costa back to consciousness. (*Id.*, p. 113).

Mr. Farenger talked to Mr. Costa and asked him a series of questions to determine if Mr. Costa could verbalize who he was, where he was and what time it was. (Schultz Dep., pp. 104-105). Mr. Costa responded to these questions correctly. (*Id.*). However, Mr. Costa had some retrograde amnesia; he was unable to recall how it was that he had become unconscious. (Farenger Dep., pp. 50, 87; Mize Dep., p. 116).

Mr. Farenger was to later testify that when he first encountered Mr. Costa in an unconscious state, unresponsive to various stimuli, he believed that Mr. Costa would have to be taken to a hospital for further treatment of his head injury. Mr. Farenger's conclusion was to change when the ammonia stick brought Mr. Costa back to consciousness and he began answering questions:

> Q. Up until that point, was your assumption that this was a patient that probably was gong to require transport by Community?
>
> A. Yes.
>
> Q. Tell me what changed that assumption.
>
> A. After the ammonia, he was answering questions. The ammonia stick woke him up further, and he was answering the rest of the questions appropriately. I asked numerous questions. And I'm almost confident I asked a few of them repeatedly.

Farenger Dep., pp. 85-86.

Mr. Farenger further testified that, based on the information available to him at the time, he recognized that Mr. Costa had suffered some type of head injury:

> Q. You knew with all the information that you had, however mild you might have thought it might have been, that this patient, Richard Costa, had some kind of a head injury after

you had completed your evaluation and assessment on that 1:18 a.m. run; isn't that fair?

* * *

A. As stated, yes.

Id., p. 122.

Despite this knowledge, Mr. Farenger and the other three emergency personnel at the scene decided to allow Mr. Costa to return to his motel room without getting further medical attention and they encouraged him to sleep.

Ms. Schultz acknowledged in her deposition that it is fundamental that a person who has suffered a head injury should not be encouraged to "sleep it off":

Q. If you had any suspicion that he had some kind of a head injury, that is, Mr. Costa had some kind of a head injury, you would not have encouraged him to go to the hotel to sleep, correct?

A. That's correct.

Q. Because you would know, even as a basic EMT, that that could be potentially lethal for him, depending upon the extent and nature of his head injury?

A. Yes.

Schultz Dep., p. 234.

According to the reports generated by this incident, Mr. Farenger and Ms. Schultz were at the scene for a total of twenty-two minutes. (Schultz Dep., p. 147). Mr. Henshaw and Mr. Meister were at the scene for at least sixteen minutes. (Deposition of David Henshaw, pp. 83-84). During that time period, none of the four emergency personnel took Mr. Costa's vital signs. None of the four conducted even a cursory physical examination of Mr. Costa. Indeed, other

than the sternal rub which was used to try to bring Mr. Costa back to consciousness, none of the four appears to have even touched Mr. Costa. (Farenger Dep., pp. 91-92). Thus, none of the four even examined the back of Mr. Costa's head. (*Id.*, p. 60).

Approximately six hours later, at 7:30 a.m., Mr. Baker found Mr. Costa unconscious in his motel room. City of Taylor emergency personnel were again summoned to the Ramada Inn. A different team of emergency personnel was dispatched to Mr. Costa's room where they found Mr. Costa lying on his bed unconscious. Within a minute of their arrival, this second group of EMT's completed a routine patient assessment and discovered a quarter-sized depression in the back of Mr. Costa's skull. (Deposition of Shannon Threlkeld, pp. 29-30; Complaint, ¶21). Within two minutes of their arrival, these EMT's had taken Mr. Costa's vital signs, conducted a brief neurologic assessment, checked his pupils, placed him on oxygen and were taking the necessary steps to prepare Mr. Costa for transport.

Mr. Costa was taken by ambulance to Oakwood Hospital. (Complaint, ¶23). After being stabilized, he was airlifted to the University of Michigan Hospital where an epidural hematoma was diagnosed. (*Id.*). Mr. Costa underwent an emergency craniotomy for that epidural hematoma. (*Id.*). As a result of the epidural hematoma, Mr. Costa has sustained severe and permanent neurologic deficits, including the loss of vision in one eye and serious cognitive impairments.

Mr. Costa and his wife, Cindy Costa, filed this action in the Wayne County Circuit Court on January 22, 2002. Named as defendants in the case were the two City of Taylor Fire Department employees, Mr. Farenger and Ms. Schultz, who first responded to the 911 call, as well as CEMS and its two employees who were dispatched to the Ramada Inn in the early

morning hours of August 3, 1999, Mr. Henshaw and Mr. Meister. Because plaintiffs alleged a claim of medical malpractice against Donald Farenger and Lisa Schultz, plaintiff's Complaint was accompanied by an affidavit of merit in compliance with MCL 600.2912d.

On March 8, 2002, Ms. Schultz filed her Answer to the plaintiffs' complaint. Approximately one month later, Mr. Farenger filed his Answer. Neither of these two defendants filed an affidavit of meritorious defense as required by MCL 600.2912e.

In December 2002 and January 2003, each of the defendants filed motions for summary disposition. Each of the defendants argued that as a matter of law their conduct in this case did not amount to gross negligence as required by MCL 691.1407(2)(c) or MCL 333.20965(1). The two governmental defendants, Mr. Farenger and Ms. Schultz, further argued that they were entitled to summary disposition because their misconduct did not represent "the immediate efficient, direct cause preceding the injury." *See Robinson v City of Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

At the time the defendants motions were filed, considerable discovery had been conducted on the underlying facts. However, when these motions were filed no expert depositions had yet been taken. Thus, the motions which were filed by the defendants were not supported by any exploration of the medical standards which governed the defendant's behavior with respect to their August 3, 1999 encounter with Mr. Costa.

Plaintiffs responded to the defendants' motions with, among other things, copies of the affidavits of merit which had accompanied their Complaint. Plaintiffs also filed a motion for summary disposition and/or default against Mr. Farenger and Ms. Schultz based on their failure to comply with the affidavit of meritorious defense requirement of MCL 600.2912e.

A hearing was held on all of the pending motions on April 1, 2003. At that hearing, the circuit court ruled that plaintiffs' claim against these two defendants constituted a medical malpractice claim and was therefore subject to MCL 600.2912b and MCL 600.2912e. (Tr. 4/1/03, p. 21). Nevertheless, the circuit court indicated that it was denying the plaintiffs' motion for summary disposition and/or default and he allowed Mr. Farenger and Ms. Schultz to file appropriate affidavits of meritorious defense within thirty days. (*Id.*).

At the April 1, 2003 hearing, the circuit court further concluded that the defendants' motions for summary disposition would be denied because material issues of fact remained both with respect to gross negligence and with respect to the proximate cause issue raised by the defendants. Written orders reflecting the circuit court's rulings were entered on April 7, 2003.

Within twenty-one days of the circuit court's April 7, 2003 orders, Ms. Schultz filed an appeal of right. *Costa v Schultz*, Court of Appeals No. 247983. The asserted jurisdictional basis for Ms. Schultz's appeal was MCR 7.202(7)(a)(v), the court rule which allows an appeal of right from an "order denying governmental immunity to a governmental party." Mr. Farenger filed a cross-appeal. Plaintiff also filed a cross-appeal, seeking to challenge the circuit court's denial of their motion for default and/or summary disposition against Mr. Farenger and Ms. Schutz.

Following the entry of the April 7, 2003 orders, the three other defendants, Community Emergency Medical Services, Inc., Dave Henshaw and Scott Meister, filed an Application for Leave to Appeal in the Court of Appeals, seeking to appeal from the circuit court's interlocutory decision denying their request for summary disposition. *Costa v Community Emergency Medical Services*, Court of Appeals No. 248104.

On August 14, 2003, a panel of the Court of Appeals granted that Application for Leave.

After the Court of Appeals granted defendants' application for leave, plaintiffs filed a timely cross-appeal, again challenging the circuit court's decision denying their motion for summary disposition and/or default against Mr. Farenger and Ms. Schultz.[1]

On September 21, 2004, a panel of the Court of Appeals issued a published decision reversing the circuit court's decision denying the defendant's request for summary disposition. A copy of the Court of Appeals' decision is attached hereto as Exhibit A.

The Court of Appeals determined that the allegations contained in the plaintiff's complaint did not rise to the level of gross negligence. The Court of Appeals first addressed the gross negligence issue as it applied to defendants Farenger and Schultz as follows:

> Plaintiffs alleged that the defendants Farenger and Schultz failed (1) to assess Costa's vital sings; (2) to conduct a physical examination of Costa while he remained unconscious; (3) on Costa's regaining of consciousness, to properly assess his competence to refuse treatment; (4) to explain to Costa the potential consequences of his refusal of treatment; and (5) to transport Costa to a hospital. Farenger and Schultz arrived on the scene after receiving dispatch information about a man lying unconscious in a parking lot. When they arrived, within four minutes o the dispatch, they found Costa reclined in the passenger

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[1]The significance of the second cross-appeal filed by the plaintiffs apparently escaped the members of the Court of Appeals' panel who decided this case. All three members of the panel saw fit to address at some length the jurisdictional question of whether plaintiff's cross-appeal from Ms. Schultz's appeal of right under MCR 7.202(6)(a)(v) was jurisdictionally proper. The essence of this issue depends on the appropriate interpretation of language contained in MCL 7.203(A)(1), which specifies that when the jurisdictional bias for an appeal of right is MCR 7.202(6)(a)(iii) - (v), the appeal "is limited to the portion of the order to which there is an appeal of right." The nuances of the appropriate interpretation of MCR 7.203(A)(1) are beyond the scope of this Application. But, what is important is that the Court of Appeals' extended discussion of this jurisdictional question was completely irrelevant herein since plaintiffs unquestionably had the right to cross-appeal following the Court of Appeals decision to grant leave to appeal to defendants CEMS, Henshaw and Meister. In that cross-appeal, plaintiffs were unquestionably entitled to raise *any* issue, including the claim that the circuit court erred in denying its motion for summary disposition/default against Mr. Farenger and Ms. Schultz.

> seat of a vehicle. Costa's co-worker, Baker, adamantly denied that Costa ever laid on the ground, but admitted that Costa became unconscious after Baker punched him in the face. Baker believed that Costa had ingested four scotch and waters, but Farenger did not smell alcohol emanating from Costa. Farenger and Schultz observed a small spot of blood on one of Costa's nostrils. Although Costa did not immediately respond to Farenger's voice or to a painful stimulus, he became coherent after an ammonia inhalant was placed under his nose and correctly answered a series of questions to gauge his level of consciousness and mental capacity. Costa appeared competent to refuse treatment, signed a form refusing further treatment, and walked into the hotel where he was staying.
>
> Despite plaintiffs references in their complaint to "gross negligence," we find that the allegations here sound only in ordinary negligence. *See Smithy v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). No reasonable juror could have found that Farenger and Schultz behaved so recklessly "as to demonstrate a substantial lack of concern for whether an injury results."

Opinion (Exhibit A), p. 4.

While the Court of Appeals ruled that Mr. Farenger and Ms. Schultz were entitled to summary disposition on the ground that plaintiff's allegations did not rise to gross negligence, the Court also cryptically suggested that these two defendants would also be entitled to summary disposition on causation grounds. The Court of Appeals' entire examination of this causation issue is contained in a single sentence in which it concluded, "given the undisputed evidence that Baker punched Costa in the face and knocked him down before Farenger and Schultz arrived on the scene, reasonable jurors could not have found that Farenger's and Schultz's actions were the proximate cause of Costa's injuries." Opinion (Exhibit A), p. 4.

The Court of Appeals further concluded that analysis as it applied to the remaining defendants, CEMS, Henshaw and Meister were entitled to summary disposition on the gross

negligence issue. The Court's analysis of the claims against these defendants mirrored that which it used in disposing of plaintiffs' claims against Mr. Farenger and Ms. Schultz. The Court concluded, "despite references in their complaint to "gross negligence," the allegations sound only in ordinary negligence and do not allege the gross negligence or wilful misconduct needed to overcome EMSA immunity." (*Id.*, p. 5).

Finally, the Court of Appeals rejected plaintiffs' cross-appeal based on the circuit court's denial of their motion for summary disposition. (*Id.*).

ARGUMENT

I. THIS COULD SHOULD REVIEW THE QUESTION OF WHETHER, BASED ON THE EVIDENCE PRESENTED, THE DEFENDANTS WERE ENTITLED TO SUMMARY DISPOSITION ON THE ISSUE OF GROSS NEGLIGENCE.

All of the defendants named in this case were subject to a gross negligence standard. Pursuant to MCL 691.1407(2)(c), the two governmental employees named in this case, Mr. Farenger and Ms. Schultz, may only be liable for conduct amounting to gross negligence. Similarly, the remaining defendants are subject to a gross negligence standard under the Emergency Medical Services Act, MCL 333.20965(1). Moreover, it is clear that the legal standard governing each of the parties' liability for such gross negligence is the same. Under this Court's decision in *Jennings v Southwood,* 446 Mich 125; 521 NW2d 230 (1994), the term "gross negligence" as used in MCL 333.20965(1) is to be the same as that which is used in MCL 691.1407(2)(c): "Conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

The defendant moved for summary disposition on the gross negligence issue based on MCR 2.116(C)(10). As the Michigan Court of Appeals has recently recognized, the question of whether a party's conduct constitutes gross negligence for purposes of MCL 691.1407(2)(c) is generally a question of fact for the trier of fact. *Tarlea v Crabtree,* 263 Mich App 80, 88; 687 NW2d 233 (2004); *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989). The issue of gross negligence may, however, be decided by a court where no reasonable juror could conclude that the defendant's conduct did not constitute gross negligence as defined in §1407(2)(c). This Court expressed this point in *Jackson v County of Saginaw*, 458 Mich 141;

580 NW2d 870 (1998):

> The Court of Appeals in the past has held that "[g]enerally, once a standard of conduct is established, the reasonableness of an actor's conduct under the standard is a question for the factfinder, not the court." *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989). "However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted." *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). The Court of Appeals cited both these cases in its analysis, and we agree that they established precedents form the boundaries of our review. Accordingly, our task is to review the facts, in the light most favorable to the plaintiff, and determine the appropriateness of summary disposition in favor of the defendant.

Id. at 146-147.

Thus, to prevail in their motion for summary disposition on the gross negligence issue, the defendants had to carry the burden of demonstrating that no reasonable juror could conclude that they engaged in conduct which demonstrated "a substantial lack of concern for whether an injury results." As in every other request for summary disposition, the defendants had to carry this burden while all of the facts presented and all reasonable inferences derived from those facts in the light were construed in the light most favorable to the plaintiff. *Skinner v Square D Co.*, 445 Mich 153; 516 NW2d 475 (1994); *Maiden v Rozwood*, 461 Mich 109,120; 597 NW2d 817 (1999).

The Court of Appeals entire approach to the gross negligence issued presented in this case was horribly flawed. Despite the fact that the parties, in briefing the summary disposition issues in the circuit court, presented an enormous amount of material derived from the extensive discovery conducted in this case, the Court of Appeals herein inexplicably treated this case as if it were reviewing a motion filed under MCR 2.116(C)(8). Repeatedly in its September 21, 2004,

decision, the Court of Appeals made reference to the *allegations* and whether these *allegations* met the gross negligence standard of MCL 691.1407(2)(c).

Thus, for example, the Court described the issue presented to it as "whether, assuming the voracity of plaintiffs' allegations, they state a claim for gross negligence . . ." Opinion (Exhibit A), p. 4. After describing the issue presented to it in this way, the Court then turned specifically to the allegations in the plaintiffs' Complaint. (*Id.*). After reviewing these allegations, the Court reached its ultimate conclusion, "we find that the allegations here sound only in ordinary negligence."

The Court of Appeals' panel used precisely the same analysis with respect to plaintiffs' gross negligence claim against CEMS, Mr. Henshaw and Mr. Meister. Again, the Court indicated that it was reviewing the *allegations* made against these three defendants and it again concluded that summary disposition was appropriate in this case because, "the allegations here sound only in ordinary negligence and do not allege the gross negligence or wilful misconduct needed to overcome EMSA immunity." Opinion (Exhibit A), p. 5.

It is very difficult to understand what the Michigan Court of Appeals was doing in this case. The Court of Appeals' analysis inexplicably transformed what was undeniable a motion under MCR 2.116(C)(10) into a motion under MCR 2.116(C)(8) in which only the plaintiffs' allegations were to be reviewed to determine if the gross negligence standard was met.

The Court of Appeals approach to this case was fundamentally wrong. Yet, the Court of Appeals has in this case issued a published decision in which it has affirmatively ruled that any question related to gross negligence is to be decided on the basis of the allegations of the plaintiffs' Complaint, not on the basis of the underlying facts supporting those allegations.

It is not at all surprising in light of the Court of Appeals altogether erroneous focus on the allegations made by plaintiffs in this case that the Court of Appeals completely omitted from its analysis the *facts* accumulated during the course of discovery in this case which supported the plaintiffs' assertion of gross negligence on the part of each of the defendants. Had the Michigan Court of Appeals undertaken the appropriate review of the *facts*, as opposed to the allegations made by the plaintiffs, the Court of Appeals would have come to the same conclusion which the circuit court reached in denying the defendants' motions for summary disposition on the gross negligence issue.

Here, the evidence taken as a whole establishes a clear issue of fact regarding the gross negligence standard. The single most salient fact in this case is that each of the defendants herein encountered an individual whom they knew had been struck in the face, who had lost consciousness as a result of that blow and who remained unconscious for a significant period of time, approximately ten minutes. Despite that knowledge, the defendants performed no examination of Mr. Costa in an attempt to determine the severity of his injury. And, despite receiving a blow on the head which left him unconscious for at least ten minutes, the defendants did not transport Mr. Costa to a hospital for further treatment.

The defendants' failure to conduct any physical examination of Mr. Costa constituted a violation of the established protocols which govern the conduct of the emergency personnel involved in this case. All four of the individual defendants were governed by a set of rules referred to as the HEMS Emergency Protocol. Among the elements of that Protocol is a mandatory Initial Patient Assessment, which provides the following mandatory three step process:

2. Initial Patient Assessment

   a. Mechanism of injury - Overview the scene/patient (note age, sex, build, general state of health of patient, check for major visible injuries/bleeding).

   b. Primary survey
      1. Airway/C-spine immobilization, if necessary
      2. Breathing
      3. Circulation
      4. Stop bleeding
      5. Assess for shock
      6. Chief complaint

   c. Secondary survey
      1. Head to toe exam including vital signs, level of consciousness
      2. History of episode

The first step of this Initial Patient Assessment requires emergency personnel to "check for major visible injury/bleeding." The defendants did not comply with this aspect of the protocol when they encountered Mr. Costa in an unconscious condition.

Moreover, the third step in the required Initial Patient Assessment requires a somewhat more extensive, "head to toe exam including vital signs, level of consciousness." Again, there was no such "head to toe" examination done of Mr. Costa. This failure to comply with the HEMS Protocol took on particular importance in this case because, had the defendants done what the Protocol required, they would have discovered the depression in the back of Mr. Costa's head.

The assessments required by the HEMS Protocol are not optional. This point was reinforced in the deposition testimony of Robert Loreto, one of the emergency medical technicians who responded to the 7:30 a.m. call when Mr. Costa was again found unconscious. Mr. Loreto testified that, "everybody gets a primary survey and a secondary survey." (Loreto

Dep., p. 41). Mr. Loreto further described how the depression in Mr. Costa's skull was discovered during the mandatory "head to toe" secondary survey which he performed:

Q. Your testimony is that the depression in Mr. Costa's skull was found on the secondary survey in this case?

A. Yes, it was.

Q. And the depression in – he was lying on his left side, correct, when you came into the room, left lateral recumbent?

A. Yes.

Q. There was also a hematoma described on the back of his head?

A. It was a depression.

Q. There was a depression. Was there also, like, sometimes with a head injury you get like a goose egg, was there anything like that on the back of his head?

A. No.

Q. Just the depression?

A. Just the depression.

Q. And that's not something you were simply able to observe by looking at him?

A. No.

Q. *Somebody actually had to palpate or feel the back of his head?*

A. *Yes.*

Loreto Dep., p. 45.

The defendants herein completely failed to comply with the mandatory duties imposed on

them by the HEMS protocol. Mr. Loreto's testimony confirms that if the defendants had complied with the mandatory responsibilities contained in the Protocol, Mr. Costa's serious resulting injuries could have been avoided.

Indeed, the performance of the EMT's who responded to the later call starkly demonstrates how inadequate the defendants response was to the situation presented to them at 1:18 a.m. In that later run, the technicians involved complied with the Protocol requirements, conducted their initial and secondary survey of Mr. Costa's condition and took immediate and appropriate action for that condition. By contrast, the defendants herein, in violation of their own Protocol, did nothing other than revive Mr. Costa after he had lost consciousness for approximately ten minutes.

The facts addressed during the discovery phase of this case demonstrated that the defendants were responsible for gross negligence in other respects. Mr. Farenger candidly acknowledged in his testimony that, when he first encountered Mr. Costa in an unconscious condition, he concluded that Mr. Costa would have to be taken to a hospital for further observation and treatment. (Farenger Dep., p. 85). However, after Mr. Costa regained consciousness and answered certain questions posed to him by the defendants, Mr. Farenger determined that no further medical treatment was necessary and Mr. Costa was allowed to sign a document waiving further treatment. Mr. Farenger's reliance on Mr. Costa's verbal responses as evidence that he had not sustained a serious injury is medically indefensible.

As explained by the sole medical expert who has given a deposition in this case to date, Dr. Keith Black, a California neurosurgeon, the classic presentation of an epidural hematoma is a period of unconsciousness followed by a period of lucidity. Dr. Black testified:

A. What I would agree with is exactly what you said before is that for any healthcare professional that is evaluating a patient with a significant head injury, they need to be aware of what the neurological presentation of an epidural hematoma would be, and that is that a patient has a loss of consciousness followed by a lucid period, followed by what could be a fatal epidural hematoma if it's not recognized and treated. And for that reason, you cannot just dismiss a patient because he's – he has – you know, he has alcohol in his blood and a loss of consciousness that's just due to alcohol. You need to make sure that you exclude these life-threatening devastating possibilities of delay bleeds, and that could include epidural hematoma, subdural hematoma, intracerebral bleed, cerebral contusion.

Black Dep., p. 30.

Thus, the simple fact that Mr. Costa was briefly lucid after regaining consciousness was no indication that he had not suffered a severe, life threatening injury. As Dr. Black explained, *any* health care professional should recognize that lucidity following a period of unconsciousness after sustaining a blow to the head does not rule out an epidural hematoma - the condition that Mr. Costa was found to have hours after his encounter with the defendants.

In their circuit court motions and in their briefs in the Court of Appeals, the defendants have made much of the fact that Mr. Costa signed a form refusing further treatment. The defendants have suggested that Mr. Costa's signing of such a form somehow absolves them of responsibility for gross negligence. What this argument ignores, however, is that under the Protocols which governed the defendants' conduct, *the type of injury that Mr. Costa's sustained prevented him from refusing treatment.* The Protocols establish a three part priority system for injuries, with Priority 1 being the most severe, emergent cases and Priority 3 representing the least threatening injuries. Mr. Henshaw testified at his deposition that a patient who fell in

Priority 1 or Priority 2 could *not* refuse treatment:

> Q. If you – well, if it's determined that a patient has a priority one injury, is such a patient permitted to refuse treatment?
>
> A. No.
>
> Q. If you have a patient who has a priority two injury, is such a patient permitted to refuse treatment without contact being made with Medical Control?
>
> A. I don't believe so.

Henshaw Dep., p. 43.

Mr. Henshaw's testimony is particularly important in light of the fact that the same Protocols specifically describe certain types of injuries which can *never* be classified as Priority 3. Among the injuries identified by the HEMS Protocol which *cannot* be in this lowest rank of priority are head injuries. Again, the defendants' decision to allow Mr. Costa to even decide for himself to decline further medical treatment, following at least ten minutes of unconsciousness, was a violation of the defendants' own Protocols.

The defendants' conduct also meets the threshold for gross negligence under Michigan law in another respect. After assisting Mr. Costa in regaining consciousness and improperly allowing him to make the decision to forego further medical treatment, the defendants encouraged Mr. Costa to go back to his hotel room and get some sleep. As Ms. Schultz acknowledged in her deposition testimony, this sequence of proceeding from a head injury to sleep can in certain circumstances be "lethal". (Schultz Dep., p. 234). These actions as well represent conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results."

In response to the defendants' motions for summary disposition, plaintiff presented an affidavit signed by Richard Dalton, a licensed registered nurse and emergency medical technician. Mr. Dalton indicated that, when the defendants found Mr. Costa unconscious and unresponsive, they had an obligation "to take vital signs and perform a brief physical exam, which would have included palpating Mr. Costa's skull for assessment of a potential head injury." Mr. Dalton further indicated in his affidavit:

> It is further my opinion that, under the circumstances that existed in this case, the conduct of the EMS personnel in breaching the standard of care – and in particular, their failure to take vital signs and do a cursory physical examination which, in retrospect, would have demonstrated his skull fracture and need for immediate medical treatment – amounted to either wilful misconduct or gross negligence. In other words, *the EMS personnel had to either deliberately ignore Mr. Costa's need for immediate medical treatment or they were grossly negligent in failing to recognize it and act on it by performing a perfunctory physical exam and taking his vital signs during his period of unconsciousness*, and then, in subsequently, attributing the unconsciousness and difficulty they had awakening him to alcohol intoxication, in light of the history that they had.

Based on Mr. Dalton's affidavit alone, the circuit court could properly conclude that reasonable minds could differ on the question of whether the defendants' response to Mr. Costa's condition was so deficient as to "demonstrate a substantial lack of concern for whether an injury results."

There is another piece of evidence which should be considered in conjunction with these defendants' request for summary disposition based on gross negligence. There is no question based on the sworn testimony provided by Mr. Farenger and Ms. Schultz that the two CEMS employees, Mr. Henshaw and Mr. Meister, appeared at the Ramada Inn in the early morning hours of August 3, 1999. Ms. Schultz also testified that these CEMS employees also participated

the effort to bring Mr. Costa back to consciousness. (Schultz Dep., p. 69-70). Yet, somewhat mysteriously, the CEMS records reflect the fact that this particular run was "cancelled".

In *Maiden v Rozwood, supra*, this Court noted that one of the factors which a court could consider in determining whether the defendant was responsible for gross negligence was the defendant's conduct in refusing to cooperate with the release of records and specimens which would have brought the defendant's gross negligence to light. 461 Mich at 130. Here, Mr. Henshaw and Mr. Meister were apparently responsible for a business record which seemed to indicate that they were never at the scene of this incident. As *Maiden* demonstrates, that piece of evidence can be construed against these two defendants.

This Court has had some prior opportunity to assess the gross negligence standard contained in MCL 691.1407(2)(a) in cases arising out of the providing of medical care. It is, in plaintiffs' view, illuminating to compare these prior decisions with the facts of this case. For example, in *Jackson v Saginaw County, supra*, the defendant who was accused of gross negligence was a doctor. In *Jackson*, the Court held that this doctor could not be held grossly negligent in conjunction with his treatment of the plaintiff for the reason that the doctor, "continued to treat the plaintiff with a variety of medications, as well as administering various tests" and that the doctor "reacted with different treatments each time the plaintiff was seen by him." *Jackson*, 458 Mich at 151.

Thus, in *Jackson*, the defendant doctor was found to be not responsible for gross negligence precisely because of various other treatments and medications he provided to the plaintiff in attempting to address the plaintiff's medical problems. The facts in *Jackson* bear no resemblance whatsoever to those in this case. Here, the defendants did nothing other than

reviving Mr. Costa after he was unconscious for a period of ten minutes. The defendants recognized that Mr. Costa had suffered a head injury since he has been unconscious for so long. But, in the face of that knowledge, the defendants did nothing. They took no vital signs, they did not perform a hands-on examination of Mr. Costa. They completely failed to follow their own Protocols requiring the examination and treatment of Mr. Costa's condition. In *Jackson*, the defendant doctor was found not to have demonstrated "a substantial lack of concern for whether an injury results" because he continued to provide treatment to the plaintiff. Here, the conduct of the defendants meets the gross negligence standard because they did absolutely nothing in the fact of a potentially serious head injury other than reviving Mr. Costa.

This Court also addressed the gross negligence standard in the context of medical care in *Maiden, supra*. The *Maiden* decision involved two cases, the first of which centered on a plaintiff who after acting in a violent fashion, the defendants were compelled to take emergency measures to restrain. The Court stressed in this aspect of the *Maiden* decision that, "the imminent danger posed by decedent's volatile behavior required that the staff exercise split-second judgment in deciding how and when to use physical intervention." 461 Mich at 126-127.

The instant case involves none of the emergency decision making which the Court found dispositive in *Maiden.* Here, the defendants confronted an individual who, far from being volatile or dangerous, was completely unconscious. The gross negligence claim in this case was based on the fact that the defendants failed to respond in an appropriate fashion to Mr. Costa's unconscious status.

The second case which was decided under the *Maiden* caption is of even greater significance here. In *Reno v Chung*, the Court determined that reasonable jurors could find that

gross negligence existed under the facts established therein. The Court stressed in the *Reno* case that the affidavits submitted by the experts, "reveal more than a mere difference of medical opinion." *Id.* at 129. The Court held, instead, in *Reno* that the defendants medical findings were "incompetent".

This Court's ruling in *Reno* unquestionably establishes that where medical care is patently deficient, a motion for summary disposition based on the gross negligence standard of MCL 691.1407(2)(c) is to be denied. The conclusion reached by this Court in *Reno* is particularly important herein in light of the procedural status of this case at the time the defendants filed their motions for summary disposition.

As of the date that the defendants' motions for summary disposition were filed and parties had expended considerable effort in discovering the underlying facts. Numerous depositions of various fact witnesses had been taken. However, at the time that the defendants filed their motions, none of the medical experts had been deposed. Thus, in filing their motions for summary disposition, the defendants did not delve into the question of the appropriate standard of contact for an emergency medical technician confronting a person in the condition of someone like Mr. Costa. Instead, the only medical testimony presented in conjunction with the defendants' motions was evidence submitted by the plaintiffs. That medical testimony established not merely that the defendants breached the applicable standard of care, but that the defendants misconduct went beyond simple negligence. In failing to do what the defendants' Protocols required them to do, the defendants were responsible for conduct demonstrating "a substantial lack of concern for whether an injury results."

For all of the reasons detailed above, this Court should grant leave to review the Court of

Appeals' decision in this case. This Court should review and reverse the Court of Appeals' published decision because that decision erroneously focused on the allegations contained in the plaintiffs' Complaint as opposed to the facts generated in this case bearing on the question of gross negligence. Based on these facts, the Court of Appeals should have concluded that a reasonable juror could find that the defendants' conduct was so reckless as to demonstrate "a substantial lack of concern for whether an injury results."

II. TO THE EXTENT THE COURT OF APPEALS RULED THAT DEFENDANTS FARENGER AND SCHULTZ WERE ENTITLED TO SUMMARY DISPOSITION ON THE ISSUE OF PROXIMATE CAUSE, THIS COURT SHOULD REVIEW THAT DETERMINATION.

Mr. Farenger and Ms. Schultz, as governmental employees, raised a second argument in support of their motion for summary disposition. They contended that under MCL 691.1407(2)(c), they were entitled to summary disposition because plaintiff could not establish the requisite causal relationship between the defendants' gross negligence and Mr. Costa's injuries. In *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), the Supreme Court held that MCL 691.1407(2)(c)'s use of the term "the proximate cause" precluded a finding of liability if the plaintiff could only establish that the defendants' misconduct was *a* proximate cause of the plaintiff's injury. Instead, the *Robinson* Court held that as MCL 691.1407(2) is written, a governmental employee could be held liable only if his/her gross negligence was "the immediate efficient, direct cause preceding the injury." *Robinson*, 462 Mich at 462.

The Court of Appeals in its September 21, 2004 Opinion focused its attention on the issue of gross negligence. However, in a single sentence, the Court added that Mr. Farenger and Ms. Schultz would also have been entitled to summary disposition on the proximate cause question.

The Court of Appeals ruled that, "given the undisputed evidence that Baker punched Costa in the face and knocked him down before Farenger and Schultz arrived at the scene, reasonable jurors could not have found that Farenger and Schultz's actions were the proximate cause of Costa's injuries." Opinion (Exhibit A), p. 4.

The Court of Appeals' analysis of the proximate cause question presented herein is erroneous. In ruling as it did, the Court of Appeals has indicated that the acts of Mr. Baker which caused injury to Mr. Costa and caused the defendants to be summoned to the scene to provide emergency care could somehow preclude a finding that Mr. Farenger and Ms. Schultz's conduct did not represent the "immediate efficient direct cause preceding Mr. Costa's injury."

There can be little doubt that there is a temporal element to the definition of "the proximate cause" in MCL 691.1407(2)(c) as interpreted by this Court in *Robinson*. In that case, this Court indicated that the conduct of a particular defendant would represent "the proximate cause" if it was the immediate efficient direct cause preceding the injury. Thus, the fact that the defendants were called upon to treat Mr. Costa *after* he had been assaulted by Mr. Baker is of great significance in assessing the causation question presented by MCL 691.1407(2)(c).

The facts in this case establish that the defendants were summoned to the scene precisely because Mr. Costa had been rendered unconscious. At the scene, the defendants had an obligation to treat Mr. Costa for the injuries which he had sustained. Moreover, it has been alleged and will certainly be proved that, had the defendant acted in an appropriate manner when they encountered Mr. Costa, the epidural hematoma which he had sustained would have been diagnosed and treated, preventing the severe injuries which Mr.Costa sustained.

There is no question that Mr. Baker's assaultive conduct represented *a* proximate cause of

the ultimate injury which Mr. Costa sustained in this case. However, there is also no doubt that if the defendants had responded appropriately to Mr. Costa's condition, Mr. Costa's severe injuries could have been avoided. Thus, a reasonable trier of fact could properly conclude that the defendants' misconduct in failing to properly treat Mr. Costa's condition represented "the immediate efficient, direct cause" of the damages which Mr. Costa sustained as a result of the untreated epidural hematoma.

While the Court of Appeals' entire analysis of this question is confined to a single sentence, the fact remains that this sentence contained in a published opinion of the Michigan Court of Appeals could have a profound and erroneous effect on future cases addressing the causation question presented by MCL 691.1407(2)(c). If the Court of Appeals reasoning in this case were acceptable, any conduct or force representing *a proximate cause* of an injury would preclude a finding that a governmental agent's gross negligence was the proximate cause even where that governmental agent's misconduct occurred closer in time to the plaintiff's injury.

The end result of such reasoning is rather obvious. If the Court of Appeals' determination on the causation question in this case were correct, a governmental employee's gross negligence could not be the basis for liability unless that misconduct represented *the sole* proximate cause of the plaintiff's injury. That is not the standard which this Court established in *Robinson*. Presumably, this Court could have interpreted the causation language of MCL 691.1407(2)(c) as demanding that the governmental agent's misconduct represented the sole proximate cause. But that is not what this Court did in *Robinson*. Instead, this Court held that a governmental employee would not be covered by immunity where his/her gross negligence represented "the immediately efficient, direct cause preceding the injury."

The Court of Appeals' decision in this case, therefore, undermines the causation test set out by this Court in *Robinson*. It is also worth noting that the analysis of the causation question presented in this case is directly at odds with another published decision of the Court of Appeals released less than six months ago, *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004).

In *Dean*, the defendant was a firefighter who was engaged in fighting a home fire which had been set by an arsonist. Four children were located in the rear of the burning home when the defendant ordered the fire crew to shoot water toward the front of the house. This attempt to fight the fire had the effect of forcing the fire to the back of the house where the children were located, causing their deaths.

The defendant in *Dean* argued that he could not be held liable for plaintiff's decedent's deaths because his gross negligence was not the proximate cause of their deaths. A majority of this Court in *Dean* rejected this argument, concluding that the evidence could have supported the conclusion that the defendant's gross negligence was the one most immediate, efficient and direct cause of the deaths. In arriving at this conclusion, the Court in *Dean* expressly rejected the defendants' argument that his misconduct could not have been the proximate cause of the children's deaths where the fire had been originally set by an arsonist. The Court of Appeals in *Dean* ruled as follows:

> While it is likely that the arsonist was "a proximate cause" of the children's deaths, plaintiff's evidence, if proven, would show that the children would have survived the fire if Childs had not acted in a grossly negligent manner. As the factual development of plaintiff's claim may justify recovery, the trial court properly denied Child's motion for summary disposition on the ground of statutory immunity.
>
> 262 Mich App at 58.

The panel's brief discussion of the proximate cause issue in this case cannot be harmonized with the analysis employed in *Dean*. Mr. Baker's conduct, like the unknown arsonist in the *Dean* case, started a chain of events which led to Mr. Costa's injury. As in *Dean*, Mr. Baker's conduct may be deemed *a* proximate cause of Mr. Costa's injuries. However, as in *Dean*, plaintiff can demonstrate in this case that the defendants' misconduct which occurred after that of Mr. Baker was the more immediately and direct cause of the injuries which Mr. Costa sustained.

The analysis employed by the panel in *Dean* is far more consistent with this Court's reasoning in *Robinson* than the ruling of the Court of Appeals in this case. This Court should grant leave to appeal to consider the important proximate cause question which the Court of Appeals got wrong in this case.

III. THIS COURT SHOULD REVIEW THE QUESTION OF WHETHER THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION BASED ON THE DEFENDANTS' FAILURE TO FILE AFFIDAVITS OF MERITORIOUS DEFENSE AS REQUIRED BY MCL 600.2912e.

In filing their cause of action against the defendants, plaintiffs pleaded their case as a cause of action premised in medical malpractice. As such, plaintiffs complied with the mandates of MCL 600.2912d by filing an affidavit of merit. However, after the plaintiff filed the Complaint with the Affidavit of Merit, two of the defendants, Mr. Farenger and Ms. Schultz failed to file the affidavit of meritorious defense which is required under MCL 600.2912e.

Plaintiff moved for summary disposition and/or default based on the defendants' failure to comply with the mandatory requirement of MCL 600.2912e. The circuit court recognized that plaintiffs' cause of action sounded in medical malpractice. However, the circuit court refused to

grant the relief requested by the plaintiff and, instead, gave the defendants a period of time to file their affidavit of meritorious defense. The circuit court's decision was affirmed by the Court of Appeals. Opinion (Exhibit A), p. 5. Plaintiffs would ask that this Court grant leave to consider the question of the remedy available to the plaintiff for a defendant's failure to comply with the requirements set out in MCL 600.2912e.

Because Ms. Schultz and Mr. Farenger failed to file the required affidavits of merit, plaintiffs were entitled to summary disposition against these defendants. Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim. *Village of Dimondale v Grable*, 240 Mich App 553; 618 NW2d 23 (2000). For the denials and defenses contained in an Answer to a medical malpractice complaint to be valid, that answer must be accompanied by the timely submission of a proper affidavit of meritorious defense as required by MCL 600.2912e. If a defendant fails to timely file the required affidavit of meritorious defense, his/her answer fails to raise a sufficient defense, thus entitling the plaintiff to summary disposition pursuant to MCR 2.116(C)(9).

The Michigan Legislature enacted its most recent changes to the medical malpractice tort system with the passage of P.A. 1993, No. 78, which became effective on April 1, 1994. In that public act the Legislature amended MCL 600.2912d, which governs a plaintiff's obligation to file an affidavit of merit. That act also created MCL 600.2912e, a statute providing a corresponding duty on the defendant to file an affidavit of meritorious defense. As amended, MCL 699.2912d provides as follows:

> 600.2912d. Medical malpractice action; duty of plaintiff to furnish security or file affidavit.

Sec. 2912d. (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:

(a) The applicable standard of practice or care.

(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or heath facility receiving the notice.

(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

(2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 day sin which to file the affidavit required under subsection (1).

(3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912(6), the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

MCL 600.2912d.

MCL 600.2912e creates a comparable requirement that each defendant file the same type

of affidavit attesting to the merits of the defense. MCL 600.2912e states as follows:

> 600.2912e. Medical malpractice action; duty of defendant to furnish security or file affidavit.
>
> Sec. 2912e. (1) In an action alleging medical malpractice, within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d, the defendant shall file an answer to the complaint. Subject to subsection (2), the *defendant* or, if the defendant is represented by an attorney, the defendant's attorney *shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d, an affidavit of meritorious defense* signed by *a health professional* who the defendant's attorney reasonably believes *meets the requirements for an expert witness* under section 2169. The affidavit of meritorious defense shall certify that the health professional has reviewed the complaint and all medical records supplied to him or her by the defendant's attorney concerning the allegations contained in the complaint and shall contain a statement of each of the following:
>
> (a) The factual basis for each defense to the claims made against the defendant in the complaint.
>
> (b) The standard of practice or care that the health professional or health facility named as a defendant in the complaint claims to be applicable to the action and that the health professional or health facility complied with that standard.
>
> (c) The manner in which it is claimed by the health professional or health facility named as a defendant in the complaint that there was compliance with the applicable standard of practice or care.
>
> (d) The manner in which the health professional or health facility named as a defendant in the complaint contends that the alleged injury or alleged damage to the plaintiff is not related to the care and treatment rendered.
>
> (2) If the plaintiff in an action alleging medical malpractice fails to allow access to medical records as required under section

> 2912b(6), the affidavit *required* under subsection (1) may be filed within 91 days after filing an answer to the complaint.

MCL 600.2912e [emphasis added].

MCL 600.2912d and MCL 600.2912e are mirror-image statutes. See *Kowalski v Fiutowski*, 247 Mich App 156; 635 NW2d 502 (2001). These two statutes relate to the same subject matter (medical malpractice actions), and the same parties (medical malpractice litigants). They impose a consistent obligation to file an appropriate affidavit signed by a health care professional and they require the respective affidavits to contain mirror-image assertions of fact, standard of practice, breach or compliance with the standard of practice, and the manner in which the defendant's violation or compliance with the standard of care proximately caused, or did not proximately cause the plaintiff's injury.

A defendant's obligation to file the appropriate affidavits of meritorious defense in a timely manner is mandatory. MCL 600.2912e(1) states that the defense "shall" file the affidavit of meritorious defense in a timely manner. Furthermore, MCL 600.2912e(2) refers to the affidavit of meritorious defense as "required." Uses of the word "shall" and "required" indicates that the timely filing of an affidavit of meritorious defense is mandatory. *Scarsella v Pollak*, 232 Mich App 61; 591 NW2d 257 (1998) *aff'd* 461 Mich 547; 607 NW2d 711 (2000); *Kowalski v Fiutowski, supra;*, *Cvengros v Farm Bureau Insurance*, 216 Mich App 261; 548 NW2d 698 (1996); *Jordan v Jarvis*, 200 Mich App 445; 505 NW2d 279 (1993). Most recently in *Kowalski, supra*, the Court of Appeals specifically held that the timely filing of a proper affidavit of meritorious defense within the strict time frame set forth in MCL 600.2912e was absolutely mandatory. *Kowalski*, 247 Mich App at 160: 161.

In this case, neither Ms. Schultz nor Mr. Farenger complied with MCL 600.2912e.

Statutes *in pari materia* "are statutes sharing a common purpose or relating to the same subject. They are construed together as one law, regardless of whether they contain any reference to one another." *Omne Financial, Inc. v Shacks, Inc.*, 460 Mich 305; 596 NW2d 591 (1999); *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). Construction of such statutes "should effectuate each statute without repugnancy, absurdity, or unreasonableness." *Omne Financial, Inc.*, 460 Mich at 312; *People v Harrison*, 194 Mich 363, 370-371; 160 NW 623 (1916). "[T]erms of statutory provisions having a common purpose should read *in pari materia* . . . The object of this rule is to give effect to the legislative purpose as found in statutes on a particular subject." *World Book, Inc. v Department of Treasury*, 459 Mich 403, 416; 590 NW2d 298 (1999) [citations omitted]. Furthermore, "[i]dentical language should certainly receive identical construction when found in the same act." *Empire Iron Mining v Orhanen*, 455 Mich 410, 426 n 16; 565 NW2d 844 (1997), *citing Tryc v Michigan Veterans' Facility*, 451 Mich 129, 155; 545 NW2d 642 (1997); *People v Township of Munising*, 213 Mich 629, 633; 182 NW 118 (1921).

MCL 600.2912d and MCL 600.2912e are statutes which must be construed *in pari materia*. They are mirror-image statutes contained within the same public act. Accordingly, the language of these two statues must be given the same legal construction and interpretation.

Plaintiffs are unaware of any Michigan case addressing the availability of *summary disposition* as a remedy for a defendant's failure to file an appropriate affidavit of meritorious

defense in a timely manner.[2] However, in *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), this Court addressed the ramifications of a plaintiff's failure to file an affidavit of merit pursuant to MCL 600.2912d when the time period has elapsed for the filing of the plaintiff's complaint.

In *Scarsella*, the plaintiff filed a medical malpractice action against the defendant on September 22, 1995, weeks before the two year statute of limitations was set to expire. The plaintiff did not file an affidavit of merit with his complaint. The defendant filed a motion to dismiss. Two days before the hearing on the defendant's motion, plaintiff filed an affidavit of merit.

This Court in *Scarsella* adopted the reasoning of the Court of Appeals which held that the Legislature's use of the word "shall" in MCL 600.2912d, "indicates that the affidavit accompanying the complaint is mandatory and imperative." 461 Mich at 549, *citing* 232 Mich App at 63-64. The Court went on to hold that "for statute of limitation purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Id.* The Court held that the complaint was insufficient to commence the lawsuit and that the statute of limitations was not tolled following the filing of plaintiff's complaint. As a result, the plaintiff's claim was barred. *Id.* This Court's holding in *Scarsella* flatly rejected the plaintiff's attempt to validate his complaint by filing a late affidavit of merit. The plaintiff claimed that under MCL 600.5856(a), the statute of limitations was tolled by the filing of the summons and complaint, and that the late filing of the affidavit of merit did

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[2]As discussed below, the Court of Appeals in *Kowalski* held that default is, in fact, an appropriate remedy.

not affect the tolling of the statute of limitations. In holding that "shall" means "shall," with no exceptions, this Court held that "such an interpretation would undo the Legislature's clear statement that an affidavit of merit 'shall' be filed with the complaint." 461 Mich at 552.

As MCL 600.2912d and MCL 600.2912e are *in pari materia*, they must be given the same legal construction and interpretation. Thus, the holding in *Scarsella*, which addressed MCL 600.2912d, should be applied with equal force to the defendants' obligation to timely file an affidavit of meritorious defense under MCL 600.2912e. In accordance with *Scarsella*, the defendants' failure to file affidavits of meritorious defense renders their initial pleading (i.e., their answer to plaintiff's complaint) insufficient to raise a valid defense. If the complaint of a plaintiff who fails to timely file an affidavit of merit is insufficient to state a claim within the allotted time, then the answer of a defendant who fails to file an affidavit of meritorious defense is insufficient to state a valid defense. The Court of Appeals recently reached this same conclusion in *Kowalski*, *supra*, in which it held that "both plaintiffs' and defendants' affidavits are *part of the pleadings*." *Kowalski* at 163 [emphasis added]. As it pertains to defendants, the Court held that "[w]ithout the affidavit, the answer is incomplete and does not conform with the rules [of pleading]." *Id.,* at 164. Thus, pursuant to MCR 2.116(C)(9), the defendants have failed to state a valid defense to the claims asserted against them.

Because the two defendants herein failed to file affidavits of meritorious defense, plaintiffs should have been entitled to either a summary disposition or default as to the liability of these defendants, with only the issue of damages remaining to be submitted to the jury. This Court should grant leave to appeal in this case to consider the appropriate resolution of a defendant's failure to comply with MCL 600.2912e in light of the Court's prior decision in

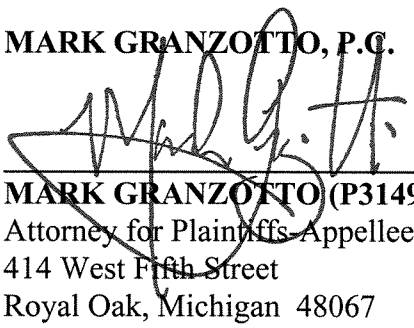
Scarsella.

RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellants, Richard Costa and Cindy Costa, respectfully request that this Court grant their Application for Leave to Appeal and give full consideration to the legal issues presented herein. In the alternative, plaintiffs-appellants would request that this Court summarily reverse the Court of Appeals' September 21, 2004 decision and remand this matter to the circuit court for further proceedings.

Respectfully submitted,

MARK GRANZOTTO, P.C.



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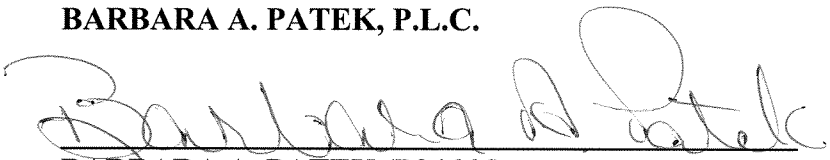

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